

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
ROBERT HYDE,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 80-190

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the issuance of Regulatory Order DE 80-579, came before the Pollution Control Hearings Board, Nat Washington, Chairman, Marianne Craft Norton, and David Akana (presiding), at a formal hearing in Longview on January 12, 1981. By agreement of the parties, Order DE 80-677 assessing a \$500 civil penalty upon appellant was also heard.

Robert Hyde, appellant, was represented by his attorney, James L. Sellers; respondent Department of Ecology was represented by Laura E. Eckert, Assistant Attorney General. Court reporter Kay E. Sims

1 recorded the proceedings.

2 Having heard the testimony, having examined the exhibits, and
3 having considered the contentions of the parties, the Board makes these

4 FINDINGS OF FACT

5 I

6 Appellant owns a 23 acre parcel of land located about 1-1/2 miles
7 northeast of the Town of La Center. Jenny Creek, a public water of
8 the state, flows southwest through the parcel year-round. About 5
9 acres around the creek are cleared lowlands. Several old logging
10 access roads lie within the parcel, one of which lies parallel to
11 Jenny Creek, another of which is perpendicular to the creek in the
12 southwest portion of the property. Jenny Creek eventually flows into
13 the east fork of the Lewis River.

14 II

15 In mid-August, 1980, appellant caused certain areas around Jenny
16 Creek to be cleared of brush and grasses with a bulldozer.
17 Additionally, some lengths of the old logging roads were scraped.

18 III

19 On September 3, 1980, in response to a complaint about appellant's
20 activities, respondent's inspectors visited appellant's site. While
21 there, no activity was observed although evidence of clearing and
22 scraping was apparent along Jenny Creek and a small unnamed tributary
23 to the creek. It was apparent to the inspectors that control measures
24 were needed at the site to prevent water erosion, and to avoid water
25 quality degradation. The inspectors contacted other state and local

1 agencies, but were unable to contact appellant. By chance on
2 September 11, 1980, appellant visited his site and came upon a group
3 of representatives from state and local agencies. At that time,
4 appellant learned of their concerns for potential water quality
5 problems resulting from his activities. The Department of Ecology
6 (DOE) inspectors attempted to reach an agreed plan to protect the
7 property from erosion and water quality degradation, but appellant
8 requested that they submit it to him in writing. Appellant did not
9 feel there was much to be concerned about. The inspectors could not
10 discover the details of appellant's plans for the property, nor did
11 the appellant disclose such plans. Due to the oncoming winter season,
12 the inspectors, with help from other agencies, devised sixteen
13 conditions as a regulatory order, which if performed, would protect
14 the water quality of Jenny Creek from erosion. The order (DE 80-579)
15 was dated September 16, 1980, served on appellant on September 30,
16 1980, by the Clark County Sheriff's office, after which appellant
17 appealed.

18 IV

19 The order (DE 80-579) purported to require appellant to take
20 immediate steps to stabilize the road and stream areas. It required
21 appellant to complete seeding operations by September 30, 1980, and to
22 complete the other required activities by October 15, 1980.
23 Additionally, a detailed plan showing all proposed road construction
24 with drainage and erosion control measures was to be submitted to
25 respondent.

26 Appellant did not comply with the order (DE 80-579). Later, some
27

1 efforts at seeding and several water bars were evident but were not
2 effective. Although appellant contended that the DOE requirements
3 would increase erosion, he did not attempt to discuss the matter with
4 DOE and chose, instead, to appeal the order.

5 V

6 At the time appellant cleared his land, he did not possess a
7 hydraulic permit from the State Department of Game or a grading permit
8 from the county, which permits were necessary for his activities.

9 VI

10 Appellant intends to remove or improve portions of the old logging
11 roads, construct new access roads, build up to three homes, and plant
12 about five to seven acres of alfalfa along the banks of Jenny Creek.
13 This intent was not communicated to the DOE inspectors, and the
14 resulting regulatory order did not take into account any specific
15 proposed project on the site. Appellant did not proceed with his
16 project because he did not possess a county grading permit.

17 VII

18 At the time regulatory order DE 80-579 was issued respondent acted
19 reasonably based upon the information it then possessed and
20 considering the information it was not provided. However, the passage
21 of time and subsequent disclosure to DOE of features of appellant's
22 project indicate that Order DE 80-579 is not presently appropriate.

23 VIII

24 There are irrigation and domestic uses of waters downstream from
25 appellant's property.

1 Turbidity¹ in a stream is a detriment to fish because it impedes
2 their ability to seek food. A reduction in fish population reduces
3 recreational fishing. Noticeable turbidity is also aesthetically
4 displeasing.

5 IX

6 On November 7, 1980, while inspecting Jenny Creek on appellant's
7 property, respondent's inspector saw muddy, chocolate brown-colored
8 water in the creek. The source of the muddy water was traced to
9 runoff on and over the old logging road parallel to Jenny Creek which
10 appellant had earlier graded. Samples taken showed that turbidity
11 in Jenny Creek was substantially increased, from 100 NTU to 700 NTU,
12 because of runoff from appellant's road and property. Although there
13 is evidence that brief periods of heavy rain occurred that day, such
14 rainfall was not shown to be unforeseeable.

15 Appellant's water sampling conducted on December 24, 1980, does
16 not show that DOE's samples taken on November 7, 1980, were erroneous.

17 X

18 The water quality standards for Jenny Creek must meet, at a
19 minimum, those standards for class "A" waters. With respect to
20
21
22
23

24 1. Turbidity is the clarity of water expressed as nephelometric
25 turbidity units (NTU). WAC 173-201-025(9).

1 turbidity, WAC 173-201-045(2)(c)(vi) provides:

2 "Turbidity shall not exceed 5 NTU over background
3 turbidity when the background turbidity is 50 NTU or
4 less, or have more than a 10 percent increase in
5 turbidity when the background turbidity is more than
6 50 NTU."

7 The regulation was based on considerations of human and animal
8 water uses, both in and out of a stream. Other factors included fish
9 feeding, light penetration and aesthetics. The particular number in
10 the regulation was derived from studies based on impacts upon fish and
11 biota, and fishing. The standard allows for increased turbidity to
12 account for natural changes in turbidity.

13 XI

14 For exceeding the turbidity standards set forth in WAC 173-201-045
15 on November 7, 1980, appellant was assessed a \$500 civil penalty.

16 XII

17 Any Conclusion of Law which should be deemed a Finding of Fact is
18 hereby adopted as such.

19 From these findings, the Board comes to these

20 CONCLUSIONS OF LAW

21 I

22 Pollution of waters occurs when there is any alteration of the
23 physical, chemical, or biological properties of waters of the state,
24 including change in color or turbidity, or introduction of any
25 substance into waters of the state which will or is likely to render
26 such waters detrimental to domestic, agricultural, recreational or
27 other beneficial uses, or to livestock, wild animals, birds, fish or

1 other aquatic life. RCW 90.48.020.

2 II

3 On or about August, 1980, appellant conducted activities on or
4 near public waters of the state which posed and continues to pose a
5 threat to the maintenance of water quality of the public waters.

6 Respondent had ample grounds under RCW 90.48.120 to issue Order DE
7 80-579.

8 III

9 On November 7, 1980, appellant caused, permitted or suffered to be
10 run, drained, or otherwise discharged into public waters a matter that
11 caused or tended to cause pollution of such waters in violation of RCW
12 90.48.080. For this violation, appellant was properly assessed a \$500
13 civil penalty pursuant to RCW 90.48.144 and Order DE 80-677 should be
14 affirmed. Payment of \$400 of the civil penalty should be suspended
15 provided that appellant take appropriate action to prevent further
16 water quality standards violations as later provided herein.

17 IV

18 Order DE 80-579 requiring that appellant take certain actions to
19 control potential pollution should be remanded to DOE for further
20 consideration in view of the passage of time and the information
21 subsequently disclosed by appellant.

22 V

23 Appellant raises a number of constitutional issues over which this
24 Board has no jurisdiction. See Yakima County Clean Air Authority v.
25 Glassam Builders, Inc., 85 Wn.2d 255 (1975); Bare v. Gorton, 84 Wn.2d
26 380 (1974).

VI

DOE has authority to adopt and enforce water quality standards. RCW 90.48.035; RCW 90.48.037; RCW 43.21A.060 and RCW 43.21A.080. The rules appear reasonably consistent with the statute it purports to implement. Weyerhauser v. Department of Ecology, 86 Wn.2d 310 (1976).

VII

The DOE has the burden of proof to show that the events supporting its orders, DE 80-579 and DE 80-677, did occur. We conclude that it has clearly met its burden based on the preponderance of the evidence.

VIII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

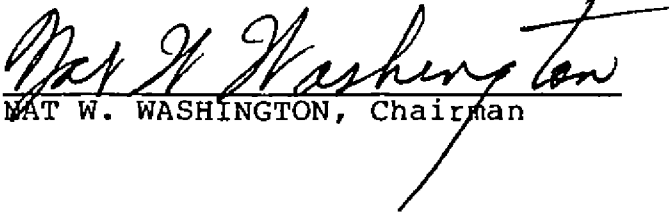
From these Conclusions, the Board enters this

ORDER

1. Department of Ecology Order DE 80-579 is remanded for further consideration.

2. Department of Ecology Order DE 80-677 assessing a \$500 civil penalty is affirmed, provided however, that \$400 of the civil penalty is suspended on conditions that appellant not violate any provision of ch. 90.48 RCW or any regulation promulgated thereunder for a period of two years after this order has become final, and that appellant comply with the terms of any final regulatory order hereafter issued by respondent with respect to the instant property.

DONE this 26th day of January, 1981.


MAT W. WASHINGTON, Chairman

MARIANNE CRAFT NORTON, Member


DAVID AKANA, Member